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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 382

A. D. EDWARDS, DORIS EDWARDS, FRANCES W. SOROKA, THOMAS BELLSNYDER, JR., J. M. BROWN, OSCAR TATE, JOSEPH R. LORINO, JOHN L. ELLIOTT, J. TRUETT PAYNE, SAM SALERNO, FRED KELLEY, CARL T. CULVERHOUSE, W. A. PARKER and JACK CLAY,
Petitioners,

vs.

SHELL OIL COMPANY, a Corporation, EAST LAWN CORPORATION, JACKSON SECURITIES & INVESTMENT COMPANY, a Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. .....

A. D. EDWARDS, DORIS EDWARDS, FRANCES W. SOROKA, THOMAS BELLSNYDER, JR., J. M. BROWN, OSCAR TATE, JOSEPH R. LORINO, JOHN L. ELLIOTT, J. TRUETT PAYNE, SAM SALERNO, FRED KELLEY, CARL T. CULVERHOUSE, W. A. PARKER and JACK CLAY,
Petitioners,

vs.

SHELL OIL COMPANY, a Corporation, EAST LAWN CORPORATION, JACKSON SECURITIES & INVESTMENT COMPANY, a Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

Your petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Alabama, entered in the above styled case on June 16, 1955.

CITATIONS TO OPINIONS BELOW.

The opinion and decree of the Circuit Court of the Tenth Judicial Circuit of the State of Alabama, in Equity (R. 330, 331, 332), is unreported and is printed in Appendix B hereto, infra, pp. 15-17. The opinion of the Supreme Court of Alabama, printed in Appendix B hereto, infra, pp. 18-28, is reported in Southern Reporter, Advance Sheets, dated June 16, 1955, 81 So. (2d) 535.

JURISDICTION.

The judgment of the Supreme Court of Alabama was entered on June 16, 1955 (R. 351-361).

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Sec. 1257 (3).

HOW THE FEDERAL QUESTION IS PRESENTED.

The enactment of an amendatory zoning ordinance of Birmingham, Alabama, being City Ordinance No. 797-F, as construed and applied by the Supreme Court of Alabama in this cause violated the primary property rights of the petitioners under Amendment XIV of the Constitution of the United States, in that, the ordinance in question constitutes an obvious effort to "spot zone" the property of the respondents for their own special benefit, and has worked irreparable hurt and damage to the property of the petitioners, transgressing their property rights without due process of law.

PROPOSITION NO. 1.

The properties of the petitioners are severally located in a highly restricted subdivision in the City of Birmingham, Alabama, known as the "Crestwood Subdivision" which was developed by the Jackson Securities & Development Company and the East Lawn Corporation, respondents herein. At the time the lots in this subdivision were sold to the petitioners and others, all property in the subdivision was zoned "A-1 Residential" under the zoning ordinances of the City of Birmingham. The petitioners herein bought their homes or builded them upon the good faith and integrity of the zoning system of Birmingham then in effect. The homes of petitioners and others in this subdivision are priced from $20,000 to $65,000, and are of varied and beautiful architectural design and layout.

PROPOSITION NO. 2.

While Block 5 of this subdivision, except lots 1, 2 and 3, was marked on the Plan as "Reserved for business," the area so reserved was still in a residential classification while the subdivision was being developed and the beautiful and expensive homes of the petitioners and others similarly situated were being constructed and purchased.

PROPOSITION NO. 3.

After disposing of some two hundred lots in the aforesaid subdivision for residential purposes and after the purchasers of said lots had invested more than $4,000,000.00 in their homes, the respondents herein, caused the City Commission of Birmingham to allegedly enact the alleged ordinance 797-F, which purports to change the zoning classification of Block 5, except lots 1, 2 and 3 thereof, from "A-1 Residential" to a Commercial District. Said ordinance was enacted September 19, 1950. Its purpose was to permit a portion of Block 5 to be leased, with the exception of lots 1, 2 and 3, to the Shell Oil Corporation, a respondent, for the purpose of constructing a filling station, and for the further purpose of permitting other commercial developments in said block five. This lease was executed January 14, 1953. Despite the advent of such commercial intrusions on the properties of the petitioners, the Supreme Court of Alabama held this amendatory ordinance 797-F to be a valid and comprehensive enactment (R. p. 358).

PROPOSITION NO. 4.

The Supreme Court of Alabama held that the question of the validity of Ordinance 797-F was material to the result decreed by the court. The Court held that the enactment of Ordinance 797-F was a comprehensive enactment (R. p. 358). Yet the record indicates clearly that no comprehensive plan was considered. The Supreme Court of Alabama conceded that "spot zoning" is illegal (R. p. 358).

The importance of this question is apparent when consideration is given to the long line of cases holding "spot zoning" invalid and when consideration is given to the failure of the Supreme Court of Alabama to so hold under the facts of this case wherein is presented a very flagrant case of "spot zoning." The failure of the Alabama Court to recognize this case as one involving the principle of illegal "spot zoning" has deprived the petitioners of the highest and best use of their properties without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment of the Supreme Court of Alabama in this cause on a Writ of Certiorari: **Fiske v. State of Kansas,** 274 U. S. 380; **Brinkerhoff-Faris Trust Co. v. Hill,** 281 U. S. 673; **Missouri ex rel. Missouri Ins. Co. v. Gehner,** 281 U. S. 313; **Saunders v. Shaw,** 244 U. S. 317; **Miedriech v. Lowenstein,** 232 U. S. 236, 34 S. Ct. 309; **North Carolina R. Co. v. Zachary,** 232 U. S. 248, 34 S. Ct. 305; **Chemical Works v. Missouri,** 238 U. S. 41, 35 S. Ct. 671; **Loeb v. Columbia Tp.,** 179 U. S. 472, 21 S. Ct. 174; **Green Bay etc. Canal Co. v. Patten Paper Co.,** 172 U. S. 58, 19 S. Ct. 97.

QUESTIONS PRESENTED.

No. 1.

Where numerous property owners constructed and purchased homes in a beautiful and highly restricted subdivision in full faith and reliance on the integrity of a residential zoning classification, did the Supreme Court of Alabama deny due process of law to these owners of property by upholding the validity of an amendatory zoning ordinance of the City of Birmingham which singled out a part of one block in said subdivision and gave to it a rating of a commercial character out of harmony with the existing property in the affected community?

No. 2.

Did the Supreme Court of Alabama deny due process of law to the petitioners when it indulged a presumption of validity in the enactment of Ordinance 797-F amending the zoning laws of Birmingham, Alabama, in the face of the uncontradicted proof in the record that only the owners and lessees of the property rezoned, the respondents herein, would benefit from the transaction?

No. 3.

Are considerations of beauty of surroundings, light, air, open space, safety for children, and a desire to protect investments guaranteeing such objectives to be cut down by business intrusions in a highly restricted residential subdivision, which intrusions of a commercial character benefit not the public generally, but only the private business investments of those who encouraged and developed the subdivision in the first instance, and then decided to attempt to pyramid their profits by urging enactment of an obvious "spot zoning" amendatory ordinance whose effect was to destroy the beauty of surroundings that had been created?

No. 4.

May special benefits be conferred on the owners of property whose classification was allegedly changed to the detriment, damage and expense of adjacent and adjoining property owners, and did the Supreme Court of Alabama deny due process of law by permitting this result to obtain in erroneously holding valid the amendatory ordinance involved in this case?

No. 5.

Did the amendatory zoning Ordinance 797-F of the City of Birmingham, Alabama, constitute a comprehensive rezoning of the small parcel of land of the respondents in the Crestwood Subdivision, or was the rezoning effected

for the private gain of the individuals and corporations who would derive pecuniary profits from such enactment?

No. 6.

Did the alleged Ordinance No. 797-F follow the procedure given in the State Act, Title 37, Chapter 16, Sec. 772, Alabama Code of 1940, when it failed to rearrange or alter the boundary of any zone or district?

No. 7.

Did the alleged Ordinance No. 797-F make illegal discriminations between persons in similar circumstances material to their rights, and did this constitute a denial of equal justice within the prohibition of the Fourteenth Amendment to the Constitution of the United States?

STATUTES INVOLVED.

The statutory provisions involved are as follows:

Ordinance No. 797-F, of the City of Birmingham, Alabama, enacted September 19, 1950.

Title 37, Chapter 16, Section 772, Alabama Code of 1940.

Amendment XIV of the Constitution of the United States.

These statutory provisions are to be found in Appendix A, infra, pp. 13-14.

STATEMENT OF THE CASE.

The respondents, to be referred to hereafter as Jackson and Associates, acquired in 1943 a tract of 205 acres in the City of Birmingham, Alabama, for the purpose of developing a high class residential subdivision. In 1946 a subdivision map was completed, and filed for record. The area was wholly undeveloped. Block 5, of this subdivision, which is the parcel of land in controversy, adjoins highway 78, extending from Birmingham to Atlanta,

and is on the northwest corner of the intersection of 56th Street, South and this super-highway. Block five contains three residential lots which are not in question in this case. The remainder of this block 5 consists of about two acres and is 436 feet wide south of the residence lots 1, 2 and 3, and extends north from the highway 429 feet.

The City of Birmingham in its comprehensive zoning plan originally zoned all of this property for residence purposes, and thereafter for several years the respondents Jackson and Associates began the sale of lots in this subdivision. Many beautiful homes were constructed. The home of the petitioners Edwards, and the intervenors are closely contiguous to the Block 5, heretofore referred to, the home of the petitioners Edwards lying immediately east of Block 5.

Ordinance 797-F rezoning the portion of Block 5 in question was enacted September 19, 1950. At this time the development of the subdivision was well underway. On January 14, 1953, Jackson and Associates leased to the respondent Shell Oil Company a portion of Block 5 in the southeast corner, 150 feet along highway 78 and 125 feet along 56th Street. This was for the purpose of constructing a filling station on the property so leased.

Neighboring property owners became alarmed as plans progressed for the building of this filling station. The original bill of the petitioners Edwards was filed April 7th, 1953, and the intervening petition of other residents of the subdivision was filed May 11th, 1953. An amendment to the original bill was filed on April 10th, 1953, and a more lengthy amended bill was filed April 17th, 1953, in which the constitutionality of Ordinance 797-F was attacked on many grounds including the ground that it violated the due process clause of the Fourteenth Amendment of the Constitution of the United States (R. pp. 13-25). Appropriate answers and demurrers were filed to all pleadings by the respondents.

The case came on to be heard on Monday, June 8th, 1953, and was concluded on Wednesday, June 10th, 1953, before Honorable Eugene Hawkins, Judge, Circuit Court of Jefferson County, Tenth Judicial Circuit of Alabama, in Equity. The court, in its opinion dated June 25th, 1953, held that Ordinance 797-F adopted by the City Commission of Birmingham on September 19th, 1950, was a valid enactment, but the court held that the location of the filling station at the site selected would constitute a nuisance as far as the property of the petitioners herein was concerned and enjoined the erection of such station, at the site designated but permitted the station to be erected at a point on the southwest corner of the Block 5 in question. Both sides seasonably perfected appeals to the Supreme Court of Alabama and assigned appropriate error.

In the proof before the court below it was uncontradicted that some three hundred very expensive homes of a highly restricted character were built in the subdivision, some before and some after the rezoning under Ordinance 797-F. Evidence was presented that the filling station was not needed and would depreciate the value of the adjacent residence properties.

The Supreme Court of Alabama, upon appeal of the case, reversed the lower court, denying any relief to the complainants and intervenors in the court below, who are the petitioners herein, and expressly held a consideration of the ordinance in question, 797-F material to the case, and held said ordinance valid in all respects. The court took the broad position that a presumption of validity attached to the enactment of said ordinance and gave scant consideration to the claim of complainants and intervenors below that the enactment of said amendatory ordinance constituted "spot zoning". The opinion of the lower court and the Supreme Court of Alabama are printed and to be found in Appendix B, infra, pp. 15-28.

REASONS FOR GRANTING THE WRIT.

Since the advent of zoning, the courts have uniformly condemned the practice of "spot zoning". The law is so well settled on this point and the cases so numerous that any reference thereto seems quite unnecessary but petitioners do submit herewith the following: **Miller v. Town Planning Commission,** 113 A. (2d) 504; **Grant v. McCullough,** 195 Tenn. 671, 270 S. W. (2d) 317; **Parker v. Rash (Ky.),** 236 S. W. (2d) 687; **Page v. City of Portland (Or.),** 165 P. (2d) 280; **Skalko v. City of Sunnyvale,** 14 Cal. (2d) 213, 93 P. (2d) 93; **DeBlasiis v. Bartell,** 143 Pa. Super. 485, 18 A. (2d) 478; **Heubner v. Philadelphia Saving Fund Society,** 127 Pa. 28, 192 A. 139; **Linden M. E. Church v. Linden,** 113 N. J. L. 188, 173 A. 593.

It is to be noted in this connection that the Supreme Court of Alabama, in the case of **Chapman v. Troy,** 241 Ala. 637, 4 So. (2d) 1, held that an ordinance creating a single residence district, leaving other areas in the city without zoning regulation as industrial, commercial or residence districts, pursuant to a comprehensive plan indicated by the state zoning act, was invalid, the court saying:

"Piecemeal ordinances are not favored."

Yet in the instant case the Supreme Court of Alabama, in approving Ordinance 797-F has approved, in principle, piecemeal zoning, so closely akin to "spot zoning."

It is a well established rule of zoning law that the power to amend zoning ordinances is not unfettered and can be exercised only when the public good demands that the amendment be made. **Offner Electronics v. Gerhardt,** 398 Ill. 265, 76 N. E. (2d) 27.

It is felt by petitioners that the primary question that presents itself for consideration in this petition is whether or not basic and fundamental rights of the petitioners were violated in the enactment of the amendatory Ordinance

797-F which singled out a parcel of land in the City of Birmingham, in the heart of a beautiful residential subdivision, Crestwood, and gave to this parcel a rating and tenor that was totally out of harmony with the adjacent neighborhood. It, in effect, placed in the middle of a residential community an unwanted commercial zone that under all the proof in the record, would be harmful to the properties adjacent to the changed zone, and was not needed as a community convenience.

Your petitioners aver that the exigencies of modern living conditions in our municipalities require that in the interest of the public health, safety, morals and general welfare, they have a primary right to the protection of the beauty of surroundings in their homes and the assurance of the preservation of property values therein, built in reliance upon the integrity of the Birmingham Zoning system then in effect. In the enactment of Ordinance 797-F authorizing an obvious "spot zone" commercial area in the heart of the beautiful subdivision in which the petitioners reside and own their homes, the local authorities transgressed and violated basic constitutional rights in and to the use of their properties, to which they are entitled, and that they are, by the result of said ordinance, deprived of the beneficial use and value of their property without due process of law and in direct violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

Your petitioners aver that this Court has at this term had occasion to express itself concerning the value of beauty of surroundings in preserving a well ordered life for the people of a community. In the case of **Berman v. Parker**, 348 U. S. 26, 75 S. Ct. 98, this court, speaking through Mr. Justice Douglas, said among other things, the following:

> "The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is

within the power of a legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

Here a relevant question arises. The City of Birmingham, by a residential classification, ordained that the Crestwood subdivision should be a thing of beauty, and evidently decided, in the first instance, that this beauty should come ahead of monetary considerations of private investors. But having, by its ordinances, joined hands, so to speak, with the respondent developers of this beautiful subdivision, did the city fathers not do a grossly arbitrary thing, when later, by the enactment of Ordinance 797-F, they permitted the destruction of the thing of beauty theretofore encouraged and created. Your petitioners think this was the result of the amendatory ordinance. By the enactment of this ordinance **all the good community-wise that had been done was undone.** There was no effort to amend a zone or district in this instance as required by the general statutes of Alabama. These general regulations the governing body of Birmingham ignored, violated and transgressed.

When all of the voluminous pleadings and testimony in the record in this cause are boiled down, there remains only one clear question presented. Did the residents of Crestwood subdivision have a right to rely on the integrity of the zoning system of Birmingham in investing their means for the purpose in living in beautiful surroundings free of commercial intrusions? If the answer is in the affirmative, then it must follow that the governing authorities were without power to destroy that which had been encouraged in the setting of high standards for dwelling houses in the subdivision question. Yet, destruction was wrought by the enactment of Ordinance 797-F. Were primary rights violated as safeguarded by the Fourteenth Amendment? These petitioners feel so.

It seems fundamental that a proper Federal question is presented for review in this case. These petitioners feel that this Court can and should look to the record in this case, re-examine the findings of the lower court and the Supreme Court of Alabama, and preserve for these petitioners their basic constitutional rights.

It is respectfully suggested that unless these petitioners are granted a review of the decision of the Supreme Court of Alabama in this case, that not only will they be incalculably harmed, but that a precendent will be set that will in days and months and years to come destroy confidence in the integrity of zoning in the United States. If the decision of the Alabama Supreme Court is to stand unchallenged in this case, no community of beauty can stand immune and confident in its desire to be beautiful rather than monetary. These petitioners feel that just as aesthetic considerations should weigh heavily in providing areas of beauty in our cities, where husbands and fathers may with pride provide places of comfort and beauty for their loved ones, so do your petitioners strongly feel that these same aesthetic considerations should be taken into account in preserving the beauty of home surroundings, established at great expense and often at great personal sacrifice, from harmful intrusions by selfish commercial interests.

CONCLUSIONS.

For the foregoing reasons it is respectfully urged that this petition for a writ of certiorari should be granted.

Respectfully submitted,

E. C. YOKLEY,
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MORTON B. HOWELL, JR.,
618 Stahlman Building,
Nashville, Tennessee,
Counsel for Petitioners.

APPENDIX A.

CONSTITUTION OF THE UNITED STATES OF AMERICA.

Article XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U. S. C., 1946 ed., p. XLIII.

ORDINANCE NO. 797-F.

An Ordinance to Amend the Zone Map of the City of Birmingham.

Be It Ordained by the Commission of the City of Birmingham as follows:

Section 1. That the Zone Map of the City of Birmingham, as described in Section 1591 of the General City Code of 1944, be, and said Zone Map hereby is, amended by rezoning or redistricting the parcel of land hereinafter in this section described so as to change such parcel from one class of districts to another class of districts as follows, to-wit:

From A-1 Residence and 1-35 to Commercial and 11-45.

All of Block 5 except Lots 1, 2 and 3, according to Map of Crestwood Addition to Woodlawn Highlands, First Sector.

Section 2. This ordinance shall become effective when published as required by law.

State of Alabama
Jefferson County

I, Eunice S. Hewes, City Clerk of the City of Birmingham, do hereby certify that the above is a true and correct copy of an ordinance duly adopted by the Commission of the City of Birmingham at its meeting held September 19, 1950, and as same appears of record in Minute Book A-33 of said City.

Given Under My Hand and Corporate Seal of the City of Birmingham, this the 13th day of April, 1953.

Eunice S. Hewes,
City Clerk.

(Seal)

Title 37, Chapter 16, Section 772,
Code of Alabama, 1940.

"Section 772. Business, industrial, or residential zones authorized.

"Each Municipal Corporation in the State of Alabama may divide the territory within its corporate limits into business, industrial and residential zones or districts and may provide the kind, character and use of structures and improvements that may be erected or made within the several zones or districts established and may, from time to time, rearrange or alter the boundaries of such zones or districts and may also adopt such ordinances as are necessary to carry into effect and make effective the provisions of this article."

APPENDIX B.

In the Circuit Court of the Tenth Judicial Circuit of the State of Alabama in Equity.

Filed and Docketed
June 25, 1953.

No. 90477.

A. D. Edwards, Doris Edwards, Frances W. Soroka, Thomas Bellsnyder, Jr., J. M. Brown, Oscar Tate, Joseph R. Lorino, John L. Elliott, J. Truett Payne, Sam Salerno, Fred Kelley, Carl T. Culverhouse, W. A. Parker and Jack Clay, Petitioners,

vs.

Shell Oil Company, a Corporation, East Lawn Corporation, Jackson Securities & Investment Company, a Corporation, Respondents.

Decree on Demurrers and Final Decree.

This Cause coming on to be heard is submitted for decree on the following separate and several demurrers:

a. The demurrer of the Respondents, Shell Oil Company, a corporation, East Lawn Corporation, and Jackson Securities & Investment Company, a corporation, to the bill of complaint, as last amended;

b. The demurrer of Shell Oil Company, a corporation, East Lawn Corporation, and Jackson Securities & Investment Company, a corporation, to the petition of intervention of Frances W. Soroka, et als. And upon consideration thereof, the Court is of the opinion that the said separate and several demurrers are not well taken and should be overruled; it is, therefore,

Ordered, Adjudged and Decreed by the Court that the said separate and several demurrers be and the same are hereby overruled.

And Now Come the parties and submit this cause for final decree upon the pleadings and proof as noted; and upon consideration thereof, the Court is of the following opinion:

A. That Ordinance No. 797-F adopted by the City Commission of the City of Birmingham on September 19, 1950, is a valid enactment by said city in all respects;

B. That the location of a filling station on the northwest corner of 56th Street and Crestwood Boulevard would constitute a nuisance per accidens insofar as the property of the complainants and some of the intervenors is concerned, and that the erection of such filling station should be enjoined by the Court. (See the cases of City of Tuscaloosa v. Standard Oil Company, 221 Ala. 670, 130 So. 186, and Bloch et al. v. McCown et al., 219 Ala. 656, 123 So. 213);

C. That this case is distinguished from the case of Nevins v. McGavock, 213 Ala. 93, 106 So. 597, in that in the latter case the Court found that the erection of a public storage garage on the proposed location should not be enjoined on the ground of a general public necessity. In this case, no public necessity was shown and to the contrary the evidence showed that there was no need of a filling station at the proposed location;

D. That while the proposed filling station is to be located upon property zoned for business purposes, this fact would not deter equity from enjoining the erection of a filling station on such location if such filling station would become a nuisance per accidens. [See Appeal of Perrin (Pa.), 156 A. 305.] That should the lessors and lessees see fit to locate a filling station on the southwest corner of Block 5 in the Crestwood Addition to Woodlawn Highlands, First Sector, fronting one hundred and fifty (150) feet on the

Crestwood Boulevard and extending south one hundred and twenty-five (125) feet, the Court is of the opinion that such a filling station would not constitute a nuisance because of the distance of such location from the residences of complainants and the intervenors; it is, therefore,

Ordered, Adjudged and Decreed by the Court as follows:

1. That the Respondents, Shell Oil Company, a corporation, East Lawn Corporation, Jackson Securities & Investment Company, be and they are hereby enjoined from locating a filling station on Block 5, Crestwood Addition to Woodlawn Highlands, First Sector, except on the southwest corner fronting one hundred and fifty (150) feet on Crestwood Boulevard and extending south one hundred and twenty-five (125) feet;

2. That the Register shall cause a copy of this decree to be served upon the Respondents, Shell Oil Company, a corporation, East Lawn Corporation, and Jackson Securities & Investment Company, a corporation;

3. That the costs herein accrued be and the same are hereby taxed against the Respondents, Shell Oil Company, a corporation, East Lawn Corporation, and Jackson Securities & Investment Company, a corporation, for which let execution issue.

Done and Ordered this the 25th day of June, 1953.

Eugene H. Hawkins,
Circuit Judge, in Equity Sitting.

6/25/53

Service accepted for the following respondents: Shell Oil Co., Inc., East Lawn Corp., and Jackson Sec. & Inv. Co., Inc.

Douglas Arant,
Attorney for the Above Three Respondents.

Filed in office June 25, 1953.

The State of Alabama — Judicial Department.

The Supreme Court of Alabama,
Spring Term, 1955.

6 Div. 620.

Shell Oil Company et al.

v.

A. D. Edwards et al.
(and cross appeal).

Filed
June 16, 1955.

Supreme Court of Alabama.

J. Render Thomas,
Clerk.

Appeals from Jefferson Circuit Court, in Equity.

Per Curiam.

The main appeal in this case is by the respondents, to whom we will sometimes refer as Jackson and associates, from a final decree in equity wherein they were "enjoined from locating a filling station in Block 5, Crestwood Addition, Woodlawn Highlands, First Sector, except on the southwest corner fronting one hundred and fifty (150) feet on Crestwood Boulevard and extending south one hundred and twenty-five (125) feet." Complainants have cross-appealed and are A. D. Edwards and wife, who purchased a house and lot immediately east of said Block 5 in November, 1952, together with twelve intervenors who likewise have purchased homes in the subdivision.

The facts developed by the pleading and evidence, briefly stated, are: Jackson and associates acquired in 1943 a large tract (205 acres) of undeveloped woodland

south of the Woodlawn section of the City of Birmingham. They intended to convert this property into a very high class residential district when an appropriate time arose. In 1946 a subdivision map was completed for them by an engineer retained for that purpose. This map was filed for record in the probate office on June 18, 1946. It contained a diagram of residence lots, streets, etc., usual in such matters. The State had acquired right of way for a four lane super-highway with dividing parkway, which extended through the southern portion of the area thus surveyed and designated. The map indicated the location of the highway which is sometimes referred to as Crestwood Boulevard. The area surveyed was designated "Crestwood Addition to the Survey of Woodlawn Highlands". The super-highway has been constructed and is the location of highway or road No. 78 extending from Birmingham to Atlanta. In a general way it extends from the west eastwardly and separates the lots as divided by the survey. The area was wholly undeveloped. Block No. 5 here considered, adjoins the highway on the north according to the map, and is west of 56th Street, which connects traffic from First Avenue, North, at Woodlawn with the highway. Block No. 5 was therefore in the northwest corner of the intersection of 56th Street, South, and the super-highway. The subdivision plan and map showed the northern portion of Block No. 5 to be divided so as to contain three residential lots. The remainder of the block was labeled on the map "**Reserved for Crestwood Business Section**". That area, as marked, was about two acres of 436 feet wide as it abutted the super-highway, and 317 feet wide south of the residence lots 1, 2 and 3, and extended north from the super-highway 429 feet.

The subdivision plan was approved by the City Commission of Birmingham on June 18, 1946, when Jackson and associates began clearing the property and constructing streets. On July 1, 1946, Jackson wrote to the Zoning

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Before that ordinance was adopted, and on June 10, 1947, Jackson and associates filed in the probate office certain restrictions which were declared to apply to the Crestwood subdivision, except such portion as was "Reserved for Crestwood Business Section", which was expressly omitted. Jackson and associates prepared and distributed a large amount of advertising matter with a map of the subdivision showing that Block 5, with the exception of lots 1, 2 and 3, was showing "Reserved for Crestwood Business Section". As stated above, the complainants are A. D. Edwards, and wife, who purchased an attractive house and lot across 56th Street, immediately east of Block 5, in November, 1952. There were twelve intervenors who had purchased homes in the subdivision. Most

of those homes were purchased by the present owners after Block 5 had been rezoned by the city commission. There is evidence that Jackson and his associates did not emphasize their purpose to carry out the plans for the business area, but at times indicates that there would be a long delay in that respect. Mr. Byrum, chairman of the board of adjustment of the city, testified in response to complaint's counsel:

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On January 14, 1953, Jackson leased to Shell Oil Company (a respondent) a portion of Block 5 in the southeast corner, 150 feet on Highway No. 78 and 125 feet along 56th Street. On February 24, 1953, the city commission adopted a resolution permitting Shell Oil Company to erect a drive-in filling station on that lot. This was approved by the chief building inspector, chief of the fire department, the city engineer and the traffic officer of the police department of the City of Birmingham. On the same day the city building inspector issued a permit for the construction of the service station, and on May 14, 1953, the fire department issued a permit for the installation of the tanks for said station.

On March 10, 1953, Mr. William Soroka, who appears as attorney for complainants, wrote Mr. Jackson that "the original plan drawn by Mr. Van Keuren for a most modern and elaborate shopping center is acceptable by the property owners of Crestwood." (Mr. Van Keuren is an architect and had made a preliminary drawing for a shopping center in Block 5.) That letter also contained the following: "Anything less, or short of that, is not acceptable. It was represented by your agents that the cost of such a shopping center would be $200,000 to $250,000 and that is in keeping with our demands. We purchased our property and our homes with the understanding that the shopping center would be the finest, in keeping with the homes in Crestwood." The drawing showed an automobile service station on the corner of 56th Street and Crestwood Boulevard. Jackson claims that he could not get the shopping center developed as contemplated. The Korean War had something to do with it at first. But that he (Jackson) always intended that Block 5 should be a shopping center with a filling station on this corner. This is about ten blocks from First Avenue, North, at Woodlawn where there is a shopping center. There are also some small stores and service stations on Fifth Avenue, South. There was not shown to be any pressing need for a filling station in Block 5. Jackson in a letter to Soroka advised him that any development "will be handled in such way as not to hurt any of our good friends in Crestwood." About three hundred very expensive and highly restricted residences have been built in the subdivision, some before and some after the rezoning.

Most of the witnesses who testified thought that a service station at this point was not needed and would depreciate the value of the residences. An effort was made to compensate Jackson in the sum of $10,000.00 if he would convert that area into residential property and to guarantee a maximum price for the lots. On April 1, 1953, Mr.

Soroka and other property owners petitioned the zoning board to amend the zoning layout so as to change Block 5 (except lots 1, 2 and 3) from commercial to residential. The board had a public hearing and numerous residents were represented and testified. The zoning board adopted a resolution recommending that the city commission had a hearing on April 7, 1953, and denied the petition. On that day the instant bill of complaint was filed.

The evidence was conflicting as to the probable effect of the proposed filling station on the property in the subdivision. We assume the trial court reached the conclusion that it would be harmful and work "hurt, inconvenience or damage" to property owners in Crestwood, or some of them here complaining (section 1081, Title 7, Code), and that it would be a nuisance on the southeast corner of block 5, but not on the southwest corner of that block, about three hundred feet away, and that the damages in consequence of such nuisance would be irreparable not merely possible, but to a reasonable degree certain (section 1083, Title 7), and, therefore, the erection of the filling station on the southeast corner should be enjoined but not on the southwest corner.

The pleadings do not put in issue any question in respect to the southwest corner. The effect of that feature of the decree is a finding that a filling station on the southeast corner would work hurt, inconvenience, or damage, whereas it would not do so on the southwest corner. That conclusion is only valuable as the finding of a fact, and can have no other force. The decree was very broad in its terms and enjoined respondents from locating a filling station anywhere on Block 5, except on the southwest corner on an area of 150 feet on the boulevard and extending back 125 feet. The court in the same decree expressed the opinion that the ordinance No. 797-F of the city commission, adopted September 10, 1950, is valid in all respects. But there was no decree to that effect.

Thompson v. Maddux, 105 Ala. 326, 16 So. 885; **Hill v. Hill**, 211 Ala. 293, 100 So. 340; **Lyall v. Lyall**, 250 Ala. 635, 35 So. 2d 550; **Employers Ins. Co. v. Brooks**, 250 Ala. 36 (4), 33 So. 2d 3. We mention that at this time because there is a cross appeal by complainants in the original bill, who assigned as error that feature of the decree holding the ordinance valid. Those assignments that have no decree of the court on which to rest.

We will have to here observe that most certainly the validity of that ordinance is material to the result decreed by the court. If the ordinance is void it is not of any value as evidence, and the area would be zoned "residential"; if it is valid, it must be given such value as authorized by law. The amended bill admits the due adoption of the ordinance but alleges that it is unconstitutional, null and void principally because it is "piece-meal" or "spot" zoning; damaging to property owners; not a fair exercise of the police power; arbitrary; not authorized by law (Title 37, Chapter 16, Code) violates the equality clause and due process clause of the Fourteenth Amendment All of the objections may be included in that analysis.

While the cross appeal and cross assignments of error cannot be upheld because there is no feature of the decree to support them, we must take a look at the ordinance rezoning the area to see if it is void, assuming that it was duly adopted. We take judicial knowledge of the ordinance of the City of Birmingham, Title 7, Section 429 (1), Pocket Park Code. Therefore, we take judicial knowledge of its initial zoning ordinance and amendments to it, which have been often before us—**Water Works Board v. City of Birmingham**, 78 So. 2d 267. The city has full police power, which includes the power to make a comprehensive zoning ordinance and amend it—Title 62, Section 654, Pocket Park Code—**Hawkins v. City of Birmingham**, 248 Ala. 692, 29 So. 2d 281.

We take judicial notice that it is comprehensive as required by Section 777, Title 37, Code and Title 62, Section 710, and recognize that the zoning of a "spot" not a part of a comprehensive plan, is not authorized by law—**Chapman v. City of Troy**, 241 Ala. 637, 4 So. 2d 1; **Davis v. City of Mobile**, 245 Ala. 80, 16 So. 2d 1; **Johnson v. City of Huntsville**, 249 Ala. 36, 29 So. 2d 342; **Alabama A. B. C. Board v. City of Birmingham**, 253 Ala. 402, 44 So. 2d 593; **Phillips v. City of Homewood**, 255 Ala. 180, 50 So. 2d 287; but that is not here undertaken. This ordinance as amended being a part of a comprehensive plan is not "spot" zoning.

Our cases do not indicate that the city may not amend its comprehensive plan by changing an area in it from one use to another. On the other hand, Section 779, Title 37, and Section 715, Title 62, Code, give express authority to do so. The nature and purpose of the zoning power together with its limitations and restrictions have been so often stated by our decisions, we need not repeat them. In addition to the cases cited above, see **Leary v. Adams**, 226 Ala. 472, 147 So. 391; **Marshall v. City of Mobile**, 250 Ala. 646, 35 So. 2d 553; **Jefferson County v. City of Birmingham**, 256 Ala. 436, 55 So. 2d 196.

It is admitted that the ordinance was duly adopted and, therefore, that there was a public hearing after notice was given when these complainants and intervenors could have been present and heard by the city commission—Sections 778, 779, Title 37, Code. The city commission's act in adopting the amendment was the result of a recommendation by all the city officers whose duty it was to see that the safety and comfort of the people are protected. They are the officers charged by law as experts on the subject to make recommendation in that respect.

The effect of the city ordinance is not to permit a service station to be operated on a lot in Block 5 as indicated, but

to enact that the city zoning system will not prohibit that to be done on the proposed lot. It simply eliminates one reason for its disallowance. The right is therefore controlled by other principles. Jackson and his lessees are not authorized to erect and maintain a nuisance on the lot in question. A filling station is not per se a nuisance though located in a residential section. **Gillette v. Tyson**, 219 Ala. 511, 122 So. 830; **Fletcher v. Barnard**, 222 Ala. 380, 133 So. 29; **Leary v. Adams**, 226 Ala. 472, 147 So. 391; **Bloch v. McCown**, 223 Ala. 348, 135 So. 633; **Maples v. Milton**, 232 Ala. 483, 168 So. 868, ib., 235 Ala. 446, 179 So. 519.

Section 1081, Title 7, Code, provides that a nuisance is "anything that worketh hurt, inconvenience, or damage to another * * *. The inconvenience complained of must not be fanciful, or such as would affect only one of a fastidious taste, but it should be such as would affect an ordinary reasonable man." A proposal may be enjoined before the structure is made only when it will cause "irreparable damages, and such consequences are not merely possible, but to a reasonable degree certain." In such event equity will "interfere to arrest a nuisance before it is completed." Section 1083, Title 7, Code.

It is settled by our decisions that the mere fact of depreciation or diminution of value, without more, is unavailing as a ground for equitable relief to enjoin the operation of a filling station. **Nevins v. McGavock**, 214 Ala. 98, 106 So. 597; **Fletcher v. Barnard**, supra; **Milton v. Maples**, 235 Ala. 446, 179 So. 519; **Marshall v. City of Mobile**, supra. That sort of hurt alone therefore does not classify a filling station as a nuisance.

So we inquire as to when its operation will be a nuisance near a residential district, but in an area which is not zoned against it and whose zoning status would permit it. It was said in **Maples v. Milton**, 232 Ala. 483, 168 So. 868, that a filling station may become an abatable nuisance if "there

be a continuing emission of odors, vapors, dust, smoke, gas and noise" and the headlights of automobiles, glaring station headlights, flashing at unreasonable hours of the night into the bedrooms and other portions of the premises, which will disturb the peace and comfort of the complainant and household, together with the operation of a tire service station on said lot which will be attended with loud and disagreeable noises due to the manipulation of steel or other metal parts with hammers and other instruments, all of which will work hurt, inconvenience and damage. Those allegations in substance are made in the bill in the instant case.

Then that case was heard on the evidence, a final decree was rendered denying the injunction on the ground that those allegations were not sustained. (**Milton v. Maples**, 235 Ala. 446, 179 So. 519.) The evidence showed that the adjoining area was not strictly residential; that other filling stations were near by; that the filling station was neatly kept; that no noise or offensive odors came from it; that it had a neat appearance; that no inconvenience was experienced from the presence of the station. There was no zoning question involved.

Those cases illustrate the theory that a filling station merely should not be classified as a nuisance because it may cause depreciation in the value of near by residential property, when it is located on a lot zoned for such enterprise; and that such a business is not per se a nuisance. But it may be so conducted as to become a nuisance as was alleged, but not proven, in the **Maples case**, supra.

In the instant case the proposal is not only not a nuisance per se, but has the unqualified approval of the city commission, the zoning board of adjustment, the building inspector, the chief of the fire department, the city engineer and traffic officer. The zoning for "commercial" was adopted before complainants purchased their property. The

maps from the beginning showed that this property was reserved for business.

The decree of the court seemed to assume that any sort of filling station on the southeast corner of Block 5 would be per se a nuisance on account of the surrounding residential restricted area. That philosophy does not conform to our cases. The filling station when completed may be conducted as in the **Maples case**, supra, and not be a nuisance. The lights may be screened off so as not to cast rays in complainant Edwards' house. If it is so operated as to be a nuisance when it is constructed, these complainants would then have just cause to complain. There is no evidence that it will be so operated. When lights will not be cause to complain has been treated with respect to other enterprises conducted at night. **Drennen v. Mason**, 222 Ala. 652, 133 So. 689; **Downey v. Jackson**, 259 Ala. 189, 65 So. 2d 825.

The decree should be reversed and one here rendered denying relief to complainants and intervenors and dismissing the cause.

The foregoing opinion was prepared by Foster, Supernumerary Justice of this Court, while serving on it at the request of the Chief Justice under authority of Title 13, section 32, Code, and was adopted by the Court as its opinion.

Cross appeal dismissed.

Reversed and rendered.

Livingston, C. J., Simpson, Goodwyn and Mayfield, JJ., Concur.

June 16, 1955.

The State of Alabama — Judicial Department.

The Supreme Court of Alabama,
October Term, 1954-55.

6 Div. 620.

Shell Oil Company et al.

vs.

A. D. Edwards et al.
(and cross appeal).

Jefferson Circuit Court,
In Equity.

No. 90477.

Come the parties by attorneys, and leave to sever in the assignments of error having been granted the appellants and cross-appellants, and the record and matters therein assigned and cross-assigned for errors, being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court, In Equity, there is manifest error.

It Is Therefore Considered, Ordered, Adjudged and Decreed that the decree of the Circuit Court, In Equity, appealed from on direct appeal be and the same is hereby reversed and annulled, and that the injunction issued under said decree be and is hereby discharged; and this Court proceeding to render the decree that the Circuit Court, In Equity, should have rendered, Doth Consider, Order, Adjudge, and Decree as follows:

1. That the Complainants and Interveners are not entitled to the relief prayed for in their Bill of Complaint as last amended, and that said relief be and the same is hereby denied.

2. That the Complainants' and Interveners' Bill of Complaint as last amended in said cause be and the same is hereby dismissed.

It Is Further Considered, Ordered, Adjudged, and Decreed that the cross appeal of appellees be and the same is hereby dismissed.

It Is Further Considered, Ordered, Adjudged, and Decreed by this Court that the costs of appeal of this Court and all of the costs of the Circuit Court, In Equity, be and the same are hereby taxed against appellees:

A. D. Edwards,
Doris Edwards,
Frances W. Soroka,
Thomas Bellsynder, Jr.,
J. M. Brown,
Oscar C. Tate,
Joseph R. Lorino,
John L. Elliott,
J. Truett Payne,
Sam Salerno,
Fred Kelly,
Carl T. Culverhouse,
W. A. Parker,
and
Jack Clay,

for which costs let execution issue accordingly.

APPENDIX C.

Excerpts From Amended Bill of Complaint Raising the Question of Unconstitutionality of Ordinance 797-F.

". . . (h). While said alleged Ordinance No. 797-F recites that it rezones or redistricts the land described therein, it does not extend a district, nor does it curtail a district. It merely undertook to class as commercial instead of residential the property of the said East Lawn Corporation, a corporation and the Jackson Securities and Investment Company, a corporation.

(i) Because before and after the attempted change, the property described in said Ordinance was in the very midst of a residential district, in which there are no improvements but high-class residences for more than two city blocks in all directions from said property, and in which territory all property therein is zoned A-1 Residential.

(j) Because the alleged Ordinance No. 797-F does not follow the procedure given in the State Act, Title 37, Chapter 16, Alabama Code of 1940, in that it does not alter or rearrange the boundary of any zone or district.

(k) Said alleged Ordinance No. 797-F is not based upon a valid exercise of the police power.

(l) Because said alleged Ordinance No. 797-F is unconstitutional, null and void, because it violates the 14th Amendment to the Constitution of the United States in that it has the effect of taking the property of complainants wihout due process of law and without making compensation therefor.

(m) Because said alleged Ordinance No. 797-F violates the 14th Amendment to the Constitution of the United States in this: it confers a special benefit on the owners whose zoning was allegedly changed at the expense of the

adjacent and adjoining owners without first compensating them for the damage done to their property by the special benefit conferred.

(n) The alleged Ordinance No. 797-F, in effect, makes illegal discriminations between persons in similar circumstance material to their rights, and this denial of equal justice is within the prohibition of the 14th Amendment to the Constitution of the United States" (page 22).

Assignments of Error 1, 2, 3, 5, 11, 17, 19, 22, 23 and 27.

"1. The court erred in the rendition of its final decree in this cause by holding:

> 'That Ordinance No. 797-F adopted by the City Commission of the City of Birmingham on September 19, 1950, is a valid enactment by said city in all respects.'

2. The court erred in its final decree in this cause by holding Ordinance No. 797-F of the City of Birmingham to be valid.

3. The court erred in its final decree in this cause by not holding Ordinance No. 797-F of the City of Birmingham invalid.

5. The court erred in its final decree in this cause by not holding Ordinance No. 797-F of the City of Birmingham invalid, in that it does not serve a public purpose related to health, safety, morals, convenience or general welfare.

11. The court erred in its final decree in this cause by not holding Ordinance No. 797-F of the City of Birmingham invalid, in that said ordinance was adopted by the city at the request and to suit the individual purposes of two property owners.

17. The court erred in its final decree in this cause by not holding Ordinance No. 797-F of the City of Birming-

ham invalid, in that said amendatory ordinance is "spot zoning."

19. The court erred in its final decree in this cause by not holding Ordinance No. 797-F of the City of Birmingham invalid, in that said amendatory ordinance is out of harmony, inconsistent and in conflict with the original comprehensive zoning scheme of the City of Birmingham.

22. The court erred in its final decree in this cause by not holding Ordinance 797-F of the City of Birmingham invalid, in that said ordinance is in conflict with the laws of the state and the state and federal constitutions.

23. The court erred in its final decree in this cause by not holding Ordinance 797-F of the City of Birmingham invalid, in that it exceeds the power to regulate by both the constitutional provisions of state and federal government and the state legislative delegation of authority.

27. The court erred in its final decree in this cause by not holding Ordinance No. 797-F of the City of Birmingham invalid, in that said ordinance does not alter or rearrange the boundary of any zone or district" (R. 345, 346, 347).

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

NO. 382.

A. D. EDWARDS, DORIS EDWARDS, FRANCES W. SOROKA, THOMAS BELLSNYDER, JR., J. M. BROWN, OSCAR TATE, JOSEPH R. LORINO, JOHN L. ELLIOTT, J. TRUETT PAYNE, SAM SALERNO, FRED KELLEY, CARL T. CULVERHOUSE, W. A. PARKER and JACK CLAY,
Petitioners,

v.

SHELL OIL COMPANY, a Corporation, EAST LAWN CORPORATION, JACKSON SECURITIES & INVESTMENT COMPANY, a Corporation,
Respondents.

BRIEF

In Opposition to Petition for a Writ of Certiorari.

STATEMENT OF THE CASE.

The Respondents disagree with the statement of the case as contained in the petition and feel that it differs from the actual record in this cause. They believe that the statement contained in the opinion of the Alabama Supreme Court is, for the most part, an accurate and reliable recital of the facts involved; for this reason and for simplicity, that statement is repeated herein:

"The main appeal in this case is by the respondents, to whom we will sometimes refer as Jackson and associates, from a final decree in equity wherein they were 'enjoined from locating a filling station in Block 5, Crestwood Addition, Woodlawn Highlands, First Sector, except on the southwest corner fronting one hundred and fifty (150) feet on Crestwood Boulevard and extending south one hundred and twenty-five (125) feet.' Complainants have cross-appealed and are A. D. Edwards and wife, who purchased a house and lot immediately east of said Block 5 in November, 1952, together with twelve intervenors who likewise have purchased homes in the subdivision.

"The facts developed by the pleading and evidence, briefly stated, are: Jackson and associates acquired in 1943 a large tract (205 acres) of undeveloped woodland south of the Woodlawn section of the City of Birmingham. They intended to convert this property into a very high class residential district when an appropriate time arose. In 1946 a subdivision map was completed for them by an engineer retained for that purpose. This map was filed for record in the probate office on June 18, 1946. It contained a diagram of residence lots, streets, etc., usual in such matters. The State had acquired right of way for a four lane superhighway with divided parkway, which extended through the southern portion of the area thus surveyed and designated. The map indicated the location of the highway which is sometimes referred to as Crestwood Boulevard. The area surveyed was designated 'Crestwood Addition to the Survey of Woodlawn Highlands.' The super-highway has been constructed and is the location of highway or road No. 78 extending from Birmingham to Atlanta. In a general way it extends from the west eastwardly and separates the lots as divided by the survey. The area

was wholly undeveloped. Block No. 5 here considered, adjoins the highway on the north according to the map, and is west of 56th Street, which connects traffic from First Avenue, North, at Woodlawn with the highway. Block No. 5 was therefore in the northwest corner of the intersection of 56th Street, South, and the super-highway. The subdivision plan and map showed the northern portion of Block No. 5 to be divided so as to contain three residential lots. The remainder of the block was labeled on the map 'RESERVED FOR CRESTWOOD BUSINESS SECTION.' That area, as marked, was about two acres of 436 feet wide as it abutted the super-highway, and 317 feet wide south of the residence lots 1, 2 and 3, and extended north from the super-highway 429 feet.

"The subdivision plan was approved by the City Commission of Birmingham on June 18, 1946, when Jackson and associates began clearing the property and constructing streets. On July 1, 1946, Jackson wrote to the Zoning Board of Adjustment requesting that Block No. 5, with the exception of lots 1, 2 and 3, be zoned 'commercial'. The city in its comprehensive zoning plan had originally zoned all this property for residences as was its custom in respect to such territory in its raw undeveloped status. The zoning board issued a certificate on July 30, 1946, showing that Block No. 5, with the exception of lots 1, 2 and 3, was zoned 'commercial', and so recommended to the city commission in 1947. But the city commission took no action in that respect until September 19, 1950, when the zoning board again brought it to their attention. On that day the city commission passed ordinance No. 797-F, which classified as 'commercial' Block No. 5, with the exception of lots 1, 2 and 3. No question was raised as to the procedural requirements in adopting the ordinance (section

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> "'And I will say from February, 1948, until the first day that you probably ever walked in my office, I have had numerous, numerous inquiries regarding the zoning of Crestwood; and it was pointed out that that area was set up, and I cannot say how many—I would estimate 150 or 200

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"On March 10, 1953, Mr. William Soroka, who appears as attorney for complainants, wrote Mr. Jackson that 'the original plan drawn by Mr. Van Keuren for a most modern and elaborate shopping center is acceptable by the property owners of Crestwood.' (Mr. Van Keuren is an architect and had made a preliminary drawing for a shopping center in Block 5.) That letter also contained the following: 'Anything less, or short of that, is not acceptable. It was represented by your agents that the cost of such a shopping center would be $200,000 to $250,000 and that is in keeping with our demands. We purchased our property and

our homes with the understanding that the shopping center would be the finest, in keeping with the homes in Crestwood.' The drawing showed an automobile service station on the corner of 56th Street and Crestwood Boulevard. Jackson claims that he could not get the shopping center developed as contemplated. The Korean War had something to do with it at first. But that he (Jackson) always intended that Block 5 should be a shopping center with a filling station on this corner. This is about ten blocks from First Avenue, North, at Woodlawn where there is a shopping center. There are also some small stores and service stations on Fifth Avenue, South. There was not shown to be any pressing need for a filling station in Block 5. Jackson in a letter to Soroka advised him that any development 'will be handled in such way as not to hurt any of our good friends in Crestwood.' About three hundred very expensive and highly restricted residences have been built in the subdivision, some before and some after the rezoning.

"Most of the witnesses who testified thought that a service station at this point was not needed and would depreciate the value of the residences. An effort was made to compensate Jackson in the sum of $10,000.00 if he would convert that area into residential property and to guarantee a maximum price for the lots. On April 1, 1953, Mr. Soroka and other property owners petitioned the zoning board to amend the zoning layout so as to change Block 5 (except lots 1, 2 and 3) from commercial to residential. The board had a public hearing and numerous residents were represented and testified. The zoning board adopted a resolution recommending that the city commission consider unfavorably the petition to amend. The city commission had a hearing on April 7, 1953, and denied the petition. On that day the instant bill of complaint was filed.

"The evidence was conflicting as to the probable effect of the proposed filling station on the property in the subdivision. We assume the trial court reached the conclusion that it would be harmful and work 'hurt, inconvenience or damage' to property owners in Crestwood, or some of them here complaining (section 1081, Title 7, Code), and that it would be a nuisance on the southeast corner of block 5, but not on the southwest corner of that block, about three hundred feet away, and that the damages in consequence of such nuisance would be irreparable, not merely possible, but to a reasonable degree certain (section 1083, Title 7), and, therefore, the erection of the filling station on the southeast corner should be enjoined but not on the southwest corner."

(Opinion of Supreme Court of Alabama, pp. 18-23 of Petitioners' Appendix.)

In the decree of the trial court there was no declaratory judgment as to the constitutionality of Ordinance No. 797-F of the City of Birmingham as prayed for in the amended bill of complaint. The Alabama Supreme Court held, therefore, that there was nothing in the record to support those assignments of error of the Petitioners which related to the constitutionality of the zoning ordinance. The Alabama Supreme Court stated, however, that it would inquire into the constitutionality of the zoning ordinance as a step in the determination of whether the trial court had been in error in holding that the proposed service station would of necessity constitute a nuisance. The City of Birmingham, although a party respondent upon submission of the cause in the trial court, has not been made a party respondent to the petition for a writ of certiorari.

ARGUMENT.

The petition for a writ of certiorari attacks the validity of Zoning Ordinance No. 797-F, which amended the existing comprehensive zoning plan of the City of Birmingham so as to zone the properties in question for commercial uses. The Petitioners contend that Zoning Ordinance No. 797-F constitutes "spot" zoning and that it is for that reason unconstitutional. They cite a number of cases holding that "spot" zoning is not favored. The Respondents make no contention that "spot" zoning is permissible and, in fact, no contrary position was taken by the Alabama Supreme Court. The Alabama Supreme Court recognized "that the zoning of a 'spot' not a part of a comprehensive plan is not authorized by law [citing several Alabama cases] . . ." (Petitioners' App. p. 25).

The Alabama Supreme Court in this case took judicial notice of the fact that the City of Birmingham had a comprehensive zoning plan and found from an examination of the facts of this case that the zoning ordinance in question was a part of that comprehensive plan and was, therefore, not "spot" zoning (Petitioners' App. p. 25). The court held also that the Alabama zoning enabling act (T. 62, Secs. 710 et seq.; T. 37, Secs. 772 et seq., Code of Alabama of 1940) permitted amendments of this type and that it was not necessary, as the Petitioners contend, that every amendment be nothing more than an alteration or extension of existing zoning boundaries (Petitioners' App. p. 25).

It appears abundantly clear, therefore, that the holding of the Alabama Supreme Court is not in conflict with the long line of cases in numerous jurisdictions dealing with "spot" zoning. The court merely applied the law established by those cases to an existing set of facts and from such facts concluded that the questioned zoning ordinance did not constitute "spot" zoning and that it was constitu-

tional. The Respondents submit, therefore, that due to the fact that this case involves merely an application of unquestioned legal principles to a purely local situation familiar to the state court, it is not a proper case for consideration by this Court.

Nor can it seriously be contended that the trial court and the Alabama Supreme Court were manifestly in error in failing to find that the ordinance in question constituted "spot zoning" and in refusing to declare that the ordinance was unconstitutional.

It is the Respondents' contention that the term "spot" zoning is but a label used to describe a zoning classification having no reasonable basis for its distinctions. It is obvious, of course, that all properties cannot be zoned alike and the primary purpose of zoning and the primary duty of administrative zoning agencies is the classification of various properties according to permissible uses. In this regard, the agencies assigned the legislative task of establishing zones are granted broad and comprehensive powers in the exercise of their judgment. It is only when the facts supply no reasonable basis to support zoning classifications and when zoning ordinances are not, therefore, based upon a "comprehensive plan" that they will be struck down as invalid. 8 McQuillin, **Municipal Corporations** (3d ed., 1950), Sec. 25.279. See also Haar, "In Accordance with a Comprehensive Plan," 68 Harv. L. Rev., 1154 (1955).

The recent trend in urban development toward the creation of large residential subdivisions in areas outside the so-called downtown section and the creation of convenient shopping centers within easy reach of those subdivisions is well known. The increased importance of the role played by the automobile in the family life has made the existence of these nearby shopping centers with their ample parking facilities a necessary part of urban development.

Courts and text writers have been quick to recognize this trend and to approve zoning ordinances permitting the location of convenient shopping centers near residential subdivisions. See, for example, 8 McQuillin, **Municipal Corporations** (3d ed., 1950), Sec. 25.115:

> "**Shopping and business center in residential district.** Under comprehensive zoning laws shopping and business centers at convenient locations in residential districts generally are permitted. They do not constitute invalid 'spot' or 'island' zoning where their existence, location and extent are reasonable. Without doubt, small business areas in or near residential districts often are a convenience and sometimes in large residential areas are a necessity. A zoning ordinance may make provision for commercial locations at convenient intervals throughout residential districts, to serve the reasonable needs of each neighborhood. Consequently, there is nothing unsound or unreasonable in the allowance of small business communities where the surrounding property remains zoned for residential uses, provided such zoning is part of a comprehensive and reasonable scheme. Thus, to permit business in a small area within a residence zone may fall within the scope of a zoning law requiring a comprehensive plan made with a reasonable consideration of the character of the district, its peculiar suitability and particular uses, conservation of values and most appropriate use of land."

See also: **Kort v. City of Los Angeles**, 52 Cal. Supp. 804, 127 P. 2d 66 (1942); **Cassel v. Mayor & City Council of Baltimore**, 73 A. 2d 486 (Md., 1950); **Wilkins v. City of San Bernardino**, 162 P. 2d 711 (Cal., 1945); **Bishop v. Board of Zoning Appeals of New Haven**, 133 Conn. 614, 53 A. 2d 659 (1947); **Higbee v. Chicago, B. & Q. Ry.**, 255 Wis. 91, 292 N. W. 320 (1940), 128 A. L. R. 734; **Town of Marblehead v. Rosenthal**, 316 Mass. 24, 55 N. E. 2d 13 (1944).

As the Supreme Court of Alabama found, the developers of the Crestwood Subdivision at all times intended to use the property in question as a shopping center or business district adjacent to that subdivision. The Respondents submit that this fact was commonly known, for a number of reasons:

(1) The original map of the subdivision was recorded in the office of the Judge of Probate of the County on June 18, 1946, over five years before the complainants below purchased their home. The subdivision map as recorded and as approved by the City Commission of the City of Birmingham on June 18, 1946, showed the property in question clearly labeled **"Reserved for Crestwood Business Section"** (Petitioners' App. p. 19).

(2) On July 1, 1946, the developers of the subdivision requested that the property in question be zoned commercial and on July 30, 1946, the Zoning Board adopted a resolution to the effect that the zoning of that property should be so changed (Petitioners' App. p. 20).

(3) On June 10, 1947, the developers of the subdivision filed in the office of the Judge of Probate of the County certain restrictions limiting the use of all of the properties in the subdivision for residential purposes only, but specifically exempted from those restrictions the property in question, which was referred to therein as being **"Reserved for Crestwood Business Section"** (Petitioners' App. p. 20).

(4) The City Commission of the City of Birmingham adopted Ordinance No. 797-F, zoning the property in question for commercial uses, on September 19, 1950, and complied, as the Petitioners admit, with all procedural requirements.

(5) Throughout the development of the subdivision and the sale of lots therein, its developers distributed a large

amount of advertising matter containing a map of the subdivision with the property here involved plainly marked **"Reserved for Crestwood Business Section"** (Petitioners' App. p. 20).

Thus it is abundantly clear that the Petitioners had ample opportunity from a number of sources to learn that the property in question was to be used for commercial purposes. From a reading of the letter of their attorney to the developers of this property indicating that a proposed shopping center which included a service station would be acceptable to the property owners of the Crestwood Subdivision, it appears that the Petitioners were aware of such intended use (Petitioners' App. p. 22). These facts lend support to the decision of the Alabama Supreme Court and clearly indicate that Ordinance No. 797-F was adopted in accordance with a comprehensive zoning plan and permitted a use established in the original development of the subdivision.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service.

A copy (in manuscript) of the foregoing Brief in Opposition to Petition for a Writ of Certiorari has this day been mailed to E. C. Yokley, Attorney at Law, 601 Stahlman Building, Nashville, Tennessee, Counsel for Petitioners.

Dated this 8th day of October, 1955.

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Douglas Arant,
Counsel for Respondents.